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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-841

CLAUDE H. SHEPHERD and EVA CHAPA SHEPHERD,

Petitioners,

—v.—

CIRO TREVINO, Tax Assessor, Collector and Registrar of Hidalgo County, Texas, *et al.*,

Respondents.

REPLY TO RESPONDENT SECRETARY'S RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPLY TO RESPONDENT SECRETARY'S RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOR THE FIFTH CIRCUIT

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INTRODUCTION

Claude and Eva Shepherd, Petitioners for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, file this brief in reply to the Response of Texas Secretary of State Mark W. White, Jr., one of the Respondents, to their petition for certiorari. Respondent White is referred to herein as "the Secretary".

JURISDICTION

Although the jurisdictional basis for the Writ of Certiorari is clear from the Petition as a whole, the following separate statement of jurisdiction was inadvertently omitted when the Petition was printed:

> The judgment of the Court of Appeals for the Fifth Circuit was entered on June 30, 1978. A timely Petition for Rehearing and Suggestion for Rehearing en Banc were denied on August 25, 1978 (579 F2d 643); and this petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

In the District Court, the Petitioners stated that their claim arose under the Equal Protection Clause of the Fourteenth Amendment and that they brought their action pursuant to 42 USC §1983, alleging jurisdiction under 28 USC §§1331 and 1343.

This jurisdictional basis is fully recognized and discussed by the Secretary in "Contest of Jurisdiction" in his Response (pages 2 and 3).

REPLY TO RESPONDENT SECRETARY'S DENIAL THAT REASONS EXIST FOR GRANTING A WRIT OF CERTIORARI

A. Respondent Mark White Was Sued In His Official Capacity as the Secretary of State of Texas.

The style of this case throughout the course of this litigation clearly shows that the three Respondents are sued only in their official capacities. The Original Petition in District Court described the Respondents solely in terms of their official capacities. Mark

White was sued as the Secretary of State because, as such, he was the chief election officer of Texas.

After the appeal was in process, Mark White resigned as Secretary of State and is now the Attorney General-elect of Texas. Steven C. Oaks replaced White. However, since White was sued as a public officer, his successor in office is automatically substituted for him.

Federal Rule of Appellate Procedure 43(c) provides that, when a public officer is a party to litigation in his official capacity and ceases to hold office, his successor is automatically substituted and "any misnomer not affecting the substantial rights of the parties shall be disregarded". Further, "the omission to enter [an] order of substitution...shall not affect the substitution".

Indeed, at oral argument before the Fifth Circuit on January 23, 1978, Respondents' counsel had no problem substituting Steven Oaks for

his predecessor Mark White. No claims of individual immunity or capacity were raised on appeal or at oral argument.

The present Secretary serves only until January 16, 1979, having been appointed by the Democratic Governor, who leaves office on January 16. He will most likely be replaced by the in-coming Republican Governor. In fact, Secretary Oaks has publicly accepted a position as a law professor at Texas Southern University in Houston.

Petitioners respectfully request the Court to enter an order, substituting Steven C. Oaks in place of Mark W. White, Jr., as the Respondent Secretary. Along with this Reply Brief, Petitioners are filing a motion to effect the substitution.

If Secretary Oaks himself leaves office, Petitioners will move the Court to substitute his successor.

B. Damages Are Not Sought Against Any Respondent.

Although the Original Petition sought damages of $11,000 from Respondents, that claim was completely abandoned on appeal and has never been urged.

The relief sought on appeal, as stated in Appellants' [Petitioners'] Brief (page 23), was to "remand this cause to the District Court with instructions to order Defendants to reenfranchise Plaintiffs". Cf. also Appellants' Reply Brief (page 8).

The only other relief discussed on appeal was framing appropriate injunctive relief for the class.

Thus, the Secretary's reliance on Scheuer v. Rhodes, 416 US 232 (1974), Wood v. Strickland, 420 US 308 (1975), and Procunier v. Navarette, 434 US 555 (1978), is misplaced.

C. Judicial Relief Is Possible In This Case And Petitioners And Their Class Are Entitled To That Relief.

The Secretary argues that Petitioners' relief rests in the Texas legislature, rather than in the courts.

That argument is particularly faulty in this case.

After the appeal was filed herein but before oral argument, several bills were introduced in the Texas Senate during the 1977 legislative session which would have re-enfranchised Petitioners and their class. However, none of those bills were enacted.

Petitioners requested the Court of Appeals, pursuant to Federal Rule of Evidence 201, to judicially notice the above facts and the efforts of their attorney to secure a legislative solution to this case. Copies of the proposed legislation and the attorney's correspondence with state legislators were provided to the

Appeals Court and to Respondents' counsel.

Presumably, the Court of Appeals did take judicial notice since those matters were discussed thoroughly during oral argument.

Judicial relief can be formulated in this case, without the complicated procedures envisioned by the Secretary.

For example, as indicated in the Conclusion of the Petition for Certiorari, Respondents could be enjoined from denying the franchise to those who are otherwise qualified to vote and who are:

1. Texas residents and successful federal felony probationers, including those probated of a felony offense
   a. which is not a felony under Texas law, and/or,
   b. for which punishment was not equivalent to a felony sentence under Texas law; or,
2. successful felony probationers in another state who are or thereafter become Texas residents, including those who are successfully probated of a felony offense

   a which is not a felony in Texas, and/or
   b. for which the punishment was not equivalent to a felony sentence in Texas, and/or,
   c. who are reenfranchised under the laws of the state which convicted them.

Other relief or a modified version of the above is possible; but, because this case arose on the grant of a motion to dismiss, Petitioners have never had an opportunity to thoroughly explore appropriate relief.

The Secretary also argues that O'Brien v. Skinner, 414 US 524 (1974), and Carrington v. Rash, 380 US 89 (1965), do not restrict Texas' ability to re-enfranchise under Section 2 of the Fourteenth Amendment.

However, those cases were cited to show that, as the Court of Appeals recognized (page 11a, Petition for Certiorari), some rational test must apply where voting rights are at issue, even when a state can legitimately limit those rights (such as under Section 2).

Carrington v. Rash held that Texas could not deny the vote to resident military personnel who were otherwise qualified to vote. Carrington clearly means that the Texas re-enfranchisement scheme cannot irrationally and arbitrarily penalize the right to travel into and take up residence in Texas by permanently denying the franchise to those convicted, but absolved, of felonies outside of Texas. It is likewise arbitrary and irrational to require that, if successful federal probationers in Texas ever want to vote for their federal or state representatives, they must leave Texas and take up residence in a state which permits even-handed re-enfranchisement.

D. No Re-enfranchisement of Successful Out-of-State Probationers.

The Secretary denies that the Texas re-enfranchisement "statute distinguishes between persons convicted in Texas and restored by Texas courts, on the one hand, and persons convicted in other jurisdictions and restored in those other jurisdictions" (page 4, Response of Mark White).

Nothing in the record supports that denial; and the Secretary failed to substantiate his denial with any Texas court case, Attorney General's opinion, or even a formal directive or instruction which he has the responsibility to issue under Article 1.03(1), Vernon's Annotated Texas Election Code.

If anything, Article 42.12, Section 7, of the Texas Code of Criminal Procedure on its face forces such a distinction. It clearly provides a re-enfranchisement scheme only for those probated in Texas state courts.

Again, because this case arises on the grant of a motion to dismiss, Petitioners have not had an opportunity to offer proof on the scope of the procedures applied to federal and out-of-state successful probationers.

E. Routine Re-enfranchisement in Hidalgo County.

The Secretary also disputes the routine re-enfranchisement of successful state probationers in Hidalgo County, relying on the confusing phrasing of Paragraph XXV of the Original Complaint and the construction applied to it by the Court of Appeals.

The Appeals Court understood Paragraph XXV to allege that 90% of successful state probationers are re-enfranchised in Hidalgo County.

However, Paragraph XXV should be understood to allege that 90% of the state probationers in Hidalgo County are successful and all those who are successful are routinely re-enfranchised. This reading is consistent with Paragraphs XXVI and XXIX of the Complaint and Petitioners' Affidavit in Support of Motion for Preliminary Injunction (which the Secretary overlooks), which claims that, had Petitioners been probated in the Texas system, they would

have been routinely re-enfranchised.

When the Secretary cites Footnote 2 of the Petition for Rehearing and Suggestion of Rehearing en Banc, he omits that part which asserts routine re-enfranchisement:

> Because this appeal is on a successful Rule 12(b)(6) motion, the Shepherd's claim that "Texas citizens convicted of felonies under state law...generally... have their right to vote restored" must be credited....

The Secretary makes a similar omission in citing Petitioners' appellate brief. The second sentence after the Secretary's citation from page 5 of Appellants' Brief reads:

> Had [Petitioners] been convicted and probated in the Texas system, their right to vote would have been automatically restored....

Cf. also pages 11-12 and 19 of Appellants' Brief and page 4 of Appellants' Reply Brief.

F. Service on Respondents

Petitioners attempted to serve their Petition for Certiorari on Respondent Tax Asses-

sor and on Respondent Chief Deputy of Voter Registration when the Petition was filed by serving the First Assistant Attorney General of Texas who had represented all Respondents at oral argument and acted as lead counsel, as noted in the appellate opinion (575 F2d at 1111):

> John L. Hill, Atty. Gen. of Tex., David M. Kendall, First Asst. Atty. Gen....for defendants-appellees [Respondents].

However, service may not have been perfected until December 26, 1978, because the First Assistant Attorney General responded only on behalf of the Secretary. To assure that service was perfected, copies of the Petition were immediately served on the Acting Criminal District Attorney of Hidalgo County for the other two Respondents on December 26, since the District Attorney had nominally represented both those Respondents in the District Court.[1]

CONCLUSION

The reasons advanced by the Secretary for not granting the Petition for a Writ of Certiorari are without merit. None of his arguments alter the validity of the reasons set forth in the Petition.

Wherefore, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing Reply Brief to the Response of Mark W. White, One of the Respondents, to the Petition for a Writ of Certiorari has been placed, postage prepaid, in the United States First Class Mail, on this 3rd day of January, 1979.

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